72-159

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-159

RALPH COX, JR. & AIR TRADEWAYS,
Petitioners-Defendants,

v.

WALTER E. HELLER & COMPANY, INC.,
Respondent-Plaintiff.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	1
Issue for Review: FRCP Rule 41-(b) Application	2
Statement of the Case: Nature of Action, Proceedings and Determination	2
Facts Relevant to Certiorari	3
Argument in Support of Certiorari	7
Conclusion	12
Appendix A	13
Appendix B	33

TABLE OF AUTHORITIES CITED

CASES

Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 100 L. ed. 199, 76 S. Ct. 273	10
Byrd v. Blue Ridge Rural Electric Cooperative, Inc. (356 U.S. 525, 2 L. ed.2d 953, 78 S. Ct. 893; May 19, 1958)	9
Cage v. Cage, 74 F.2d 377	11
Guaranty Trust Co. v. York, 326 U.S. 99, 108, 89 L. ed. 2079, 2085, 65 S. Ct. 1464, 160 ALR 1231	10
Krause v. Mississippi Coal Corp., 93 F.2d 515	11
Larsen v. O'Reilly, 11 F.R.D. 604 (S.D.N.Y.1951)	9
Pueblo de Taos v. Archuleta, 64 F.2d 807	11
Woodward v. White Satin Mills Corp., 42 F.2d 987	11

RULES

Federal Rules of Civil Procedure, Rule 41(b)	2, 7, 9, 10, 11, 12
Federal Rules of Civil Procedure, Rule 41(c)	7
Federal Rules of Civil Procedure, 28 U.S.C. 2072	11

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The petitioners Ralph Cox, Jr., and Ocean Air Tradeways respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this cause on February 26, 1973.

OPINIONS BELOW

Honorable Arnold Bauman, Judge, of the United States Court in the Southern District of New York entered judgment in this cause on June 5, 1972 against Ralph Cox, Jr. and Ocean Air Tradeways,

a partnership. Judge Bauman's opinion is reported at 343 Fed. Supp. 519. Both defendants appealed and the Second Circuit Court of Appeals affirmed, on February 26, 1973, adopting the trial court's opinion which is fully set forth in "Appendix A" to this petition.

ISSUE FOR REVIEW

FRCP RULE 41-(b) APPLICATION

Is it error for a trial court to disregard all uncontroverted evidence of another court's actual intent and to substitute therefore a dogmatic, *substantive* application of Rule 41(b) of the Federal Rules of Civil Procedure, when Rule 41(b) effects a different ultimate result than state law when applied to the same point?

STATEMENT OF THE CASE

NATURE OF ACTION, PROCEEDINGS AND DETERMINATION

This appeal arises from an action to enforce contracts of guaranty on a loan made to a third party. Federal jurisdiction in the matter is based upon the diversity of citizenship of the parties. Litigation was commenced against one of the defendant-petitioners in the U. S. District Court in the District of New Jersey. The other defendant-petitioner was sued in the U. S. District Court in the Southern District of New York. The action commenced in New Jersey was by stipulation ordered transferred to the South-

ern District of New York. The cases were subsequently consolidated for all purposes.

The consolidated cases were brought to trial on January 24, 1972. After ten days of trial the court took the matter under advisement. One hundred and ten days later, the court entered its findings in favor of the respondent. Ten days later, on June 5, 1972 judgment was entered against the petitioners in the sum of $166,017.44. From that judgment, both defendants appealed. Judgment was affirmed by the Second Circuit Court of Appeals on February 26, 1973.

FACTS RELEVANT TO CERTIORARI

Document numbers and page references are to the Record on Appeal before the Second Circuit; exhibit numbers from trial court.

The plaintiff-respondent Walter E. Heller & Company loaned $1,700,000.00 to United States Overseas Airlines on November 23, 1962. Conracts of guaranty were given to plaintiff by Ralph Cox, Jr., and Ocean Air Tradeways, a partnership, the defendants-petitioners herein (Document 19, pp. 1, 2). The plaintiff company has collected approximately $2,100.000.00 toward retirement of the $1,700,000.00 loan (Pl.'s Exh. 43).

The debt to Heller was evidenced by a promissory note by U.S.O.A. providing monthly installments. Interest at the rate of 12½% per annum was added to the principal and the note was made in the face amount of $1,979,631.75 with 24 monthly install-

ments of $69,000.00 each and a twenty-fifth final installment of $323,631.75 (Document #19, p. 2).

U.S.O.A. failed to make the first five installments when they became due. Through various means, including sales of collateral ordered by the Heller company, payments were made that exceeded the amounts of principal and interest then due Heller under the terms of the note. As of February, 1964, the monies collected by Heller exceeded the payments called for by the note by over $450,000.00 (Document #31, p. 393). Payments in advance of their due dates were made under threat of the declaration of a prior default (Document #35, p. 965). Advance collections impaired the working capital position of U.S.O.A. (Document #34, p. 857) and in July, 1965, the company was in default again when the $323,631.75 final installment came due (Document #34, p. 916).

The Heller company declared a default in July, 1965, and proceeded to enforce its contract rights against collateral (Document #34, p. 916).

U.S.O.A. filed a petition under Chapter 11 of the Bankruptcy Act in September, 1966, in the District of New Jersey. The Heller company filed a petition with that court asserting the priority of its chattel mortgage lien against all physical assets of the bankrupt and seeking permission to sell property then in possession of the trustee. The Referee entertained evidence on the amount of the debt claimed by Heller.

Subject to later determination of certain counterclaims asserted against Heller, the Referee entered an order allowing Heller to proceed with the proposed sale (Plaintiff's Exhibit 8). Under the permission of that order, the proposed sale was held on May 4, 1967.

After the sale, a date was set for the presentment of evidence on the counterclaims. For various attributable to the convenience of the parties and the court, the matter was adjourned and re-set several times. On August 28, 1967, the Referee called the matter for hearing. Mr. William Doherty of the New Jersey bar announced that his principal witness was out of the state assisting in the care of his invalid mother who was hospitalized at that time (Document #33, p. 663).

After discussing those facts, and inquiring of counsel for the Walter E. Heller Company as to the availability of his client for service of process in an action that might be commenced in a court of plenary jurisdiction on behalf of the trustee in the bankruptcy proceeding, the Referee entered an order dismissing the counterclaims.

The Referee did not expressly state that the dismissal was without prejudice, but he absolutely evidenced that as his intent to counsel in the courtroom at the time. Counsel for the debtor corporation wrote his client the following day, advising that the order of dismissal was "without prejudice to the Trustee"

maintaining an action thereon (Document #33, pp. 641-642).

Counsel for the Heller Company prepared the order of dismissal and submitted it to Referee Lipkin for signature without first procuring Mr. Doherty's approval as to its form (Document #33, pp. 697-8). The order merely stated that the counterclaims were dismissed and did not specify whether it was with, or without, prejudice (Pl.'s Exhibit 11).

The New Jersey rules provide that such an order of dismissal is not prejudicial unless it expressly provides that it is intended to be (Document #33, p. 703).

The Heller company's appearance before the bankruptcy Court was under an express reservation as to limitation of jurisdiction (Document #33, pp. 639-40).

In his decision here Judge Bauman ruled that the semantic impact of FRCP 41(b) precludes consideration of uncontradicted extrinsic evidence bearing on the court's actual intent upon the entry of an order of dismissal (Document #19, p. 7). *Appendix A.*

The defendant Ralph Cox, Jr. was a member of the defendant partnership Ocean Air Tradeways. He was also a principal shareholder and President of United States Overseas Airlines, and in that capacity

assisted in maintenance of the debtor's position in the bankruptcy proceedings before Referee Lipkin.

Judge Bauman found that Mr. Cox's participation and interest in the bankruptcy proceedings put the Ocean Air Tradeways partnership in privity with the debtor corporation, and that such privity extended the res judicata effect of the ultimate facts found by that court to the present action (Document #19, pp. 8-9).

ARGUMENT IN SUPPORT OF CERTIORARI

Is it error for a trial court to disregard all uncontroverted evidence of another court's actual intent and to substitute therefor a dogmatic, *substantive* application of Rule 41(b) of the Federal Rules of Civil Procedure, when Rule 41(b) effects a different ultimate result than state law when applied to the same point?

FRCP 41 (b) and (c) provide:

> (b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon

the facts and the law the plaintiff has shown no right to relief. *Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.* (Emphasis supplied.)

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

Upon trial of this matter, William Doherty, Esquire, duly sworn, testified that the Referee in bankruptcy intended to dismiss certain counterclaims without prejudice (Document #33, p. 641). At the time of the dismissal, the Referee made inquiry of counsel for the Heller Company as to the availability of his client for service of process for the Trustee's pursuit of the counterclaims at a later date (Document #33, pp. 639-642a).

A germane excerpt from Mr. Doherty's testimony is set forth in "Appendix B" to this petition.

Mr. Doherty further testified that he wrote the president of the debtor corporation, on the day after the hearing in which the dismissal was ordered, and advised him of the action by the court. In that letter he explained that the dismissal was without prejudice to the rights of the Trustee pursuing the counterclaims at a later date (Document #33, p. 641).

Judge Bauman committed clear error when he disregarded the foregoing uncontradicted evidence on the intended nature of Judge Lipkin's order of dismissal.

Instead of considering the competent evidence brought to bear on the point, Judge Bauman applied a dogmatic substantive interpretation of FRCP 41 (b), and held that the order was entered with prejudice. In support of his holding in that regard he cited the case *Larsen* v. *O'Reilly*, 11 F.R.D. 604 (S.D.N.Y. 1951).

Mr. Justice Brennan of the United States Supreme Court, in its majority opinion in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.* (356 U.S. 525, 2 L. ed.2d 953, 78 S. Ct. 893; May 19, 1958), reasoned: "*. . . cases following Erie [Railroad* v. *Tomkins] have evinced a broader policy to the effect that the federal courts should conform as near as may be—in the absence of other considerations—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation*

would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule." In support of the basic rationale, Justice Brennan cited *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108, 89 L. ed. 2079, 2085, 65 S. Ct. 1464, 160 ALR 1231, and *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 100 L. ed. 199, 76 S. Ct. 273.

The legislative authorization for the promulgation of the Federal Rules of Civil Procedure expressly limits the authority delegated to this court to *procedural* effect. Under present decisional interpretation, the impact of FRCP 41 (b) is *substantive*. The enactment of the rule changed the law and effectively deprives the petitioners of their most fundamental due process right of a day in court on the merits of their cause.[1]

Cases bearing on application of sections of the equity codes which pre-date enactment of modern FRCP 41 (b) have held that a decree dismissing for want of prosecution, which shows on its face the ground of dismissal, is no bar to a subsequent action,

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[1]Because of the limited review of FRCP 41 (b) by appellate courts, we have found no case law directly in point with the situation set forth in his proposition.

In all available authority, we have found inadequate background history to be of benefit to this court in its determination of this question.

The notes of the advisory committee for the adoption of the significant language in the rule were ordered impounded by Chief Justice Fred M. Vinson on November 10, 1952, and thereafter the order was reaffirmed by the succeeding Chief Justices. That order dictates present policy of the Administrative Office of the United States Courts where the records are impounded.

Mr. Carl Imlay, General Counsel to the Administrative Office referred to the Chief Justice's order in explaining to Steward R. Carter, Jr., Esquire, that the records are not available to the public, when he made inquiry there for the purpose of research on this appeal. Therefore, except by order of this court, there is no "legislative history" available as authority on the question presented.

and is not erroneous for failure to include the words "without prejudice". *Krause* v. *Mississippi Coal Corp.*, 93 F.2d 515. A dismissal for failure to prosecute should be without prejudice. *Cage* v. *Cage*, 74 F.2d 377.

Judge McDermott of the 10th Circuit Court of Appeals, in the 1933 case of *Pueblo de Taos* v. *Archuleta*, 64 F.2d 807, stated that as a general rule dismissal of a cause of action for want of prosecution is not an adjudication of the controversy so as to bar a subsequent suit on the same cause of action.

Historically in American law, a *procedural* rule such as FRCP 41 (b) has been construed so as to distinguish from purely substantive effect. Such a provision in the Equity Code was given the status of a rebuttable presumption. In *Woodward* v. *White Satin Mills Corp.*, 42 F.2d 987, the court held that although dismissal without more is presumed to be a dismissal on the merits, the record may be examined *on appeal* to ascertain what the fact is.

Petitioners urge recognition of the present validity of the rationale of the foregoing theory that FRCP 41 (b) raises a *rebuttable presumption* as to the effect of orders of dismissal. The authority for promulgation of the Federal Rules of Civil Procedure, 28 U.S.C. 2072, extends to the judicial branch of our government a *limited* legislative function for the creation of rules of *procedure*. In part, the second paragraph

provides that *"Such rules shall not abridge, enlarge or modify any substantive right . . ."*

Under the dogmatic semantic connotation applied to FRCP 41 (b) in the instant case, application of the rule can only result in a substantive effect; and therefore would exceed the limits of the enabling authority.

CONCLUSION

In the interest of justice and for the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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